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No. 04-590

IN THE

Supreme Court of the United States

EFRAÍN CLAUDIO-GOTAY, EFRAÍN CLAUDIO-CRUZ, ELIA M. GOTAY-MALDONADO, PETITIONERS

v.

BECTON DICKINSON CARIBE, LTD.; VÍCTOR PAGÁN, PERSONALLY AND AS GENERAL MANAGER OF BECTON DICKINSON CARIBE, LTD.; HIRAM OCASIO, PERSONALLY AND AS MANAGER OF BECTON DICKINSON CARIBE, LTD.; JOHN DOE; JANE DOE; INSURANCE COMPANY X & Y

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED BY PETITIONERS[1]

I. Whether the United States Court of Appeals for the First Circuit erred in ruling that an employee does not engage in a Fair Labor Standards Act protected activity when he complains about a violation of the overtime payment provisions and refuses to participate in furthering said violation of right on the

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[1] As we will address in the body of our Opposition, Respondents perceive that Petitioners are misstating facts and the applicable law, even in the Questions presented for review, hence the proper issues that would be before this Honorable Court if Certiorari is granted, differ from the ones presented in the Petition. We believe that the proper Questions presented for review should be:

Question presented for review

I. Whether the United States Court of Appeals for the First Circuit erred in ruling that an employee does not engage in a Fair Labor Standards Act protected activity when as part of his duties he informed his employer, in order to protect him, about the potential violation of the overtime provisions of a subcontractor toward that third party's employees, and then refuses to comply with his duties after been instructed to and been advised by his employer's attorney that there was no illegal act from the employer, but compliance with payment of services rendered upon a valid contract has to be made.

II. Whether the United States Court of Appeals for the First Circuit erred in dismissing the pendant jurisdiction wrongful termination claim in the district court proceedings when the federal claim related to the same facts was dismissed and the remaining federal question claim under COBRA act, is separate and independent of the facts of the state claim, for which the district court has discretion to exercise or not supplemental jurisdiction.

employees he supervised, and thus he is not entitled to a cause of action against his former employers under said statue anti- retaliation provisions.

II. Whether the United States Court of Appeals for the First Circuit erred in dismissing the pendant jurisdiction wrongful termination claim late in the district court proceedings when there is still a Federal question claim under the COBRA Act before the Federal District Court related to which pendant jurisdiction should be exercised pertaining to the wrongful discharge claim.

PARTIES

Petitioners:

Efraín Claudio Gotay –former employee of Becton Dickinson Caribe, Ltd.

Efrain Claudio-Cruz[2] – individual and father of Efraín Claudio Gotay

Elia M. Gotay-Maldonado[3] – individual and mother of Efraín Claudio Gotay

Respondents:

Becton Dickinson Caribe, Ltd. – a duly incorporated organization

Victor Pagan – General Manager of Becton Dickinson Caribe Juncos Plant

Hiram Ocasio- Manager at Becton Dickinson Caribe, Juncos Plant

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[2] Was identified in the Petition as Efraín Claudio Elías.

[3] Was identified in the Petition as Elia M. Gotay Cruz.

RULE 29.6

Respondent Becton Dickinson Caribe, Ltd. is affiliate to Becton Dickinson Medical, which is a subsidiary of Becton, Dickinson and Company. The latest is a publicly trade enterprise in the New York Stock Exchange with the financial symbol BDX.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES iii

RULE 29.6 iv

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vii

INTRODUCTION 1

STATEMENT 3

PETITIONERS' MISSTATEMENTS OF THE FACTS 6

REASONS FOR DENYING THE PETITION 9

1) There is no Circuit split on the Question Presented 10

   a) The First Circuit Court's ruling is not in contravention of the holdings of other Circuit Courts. 10

   b) Petitioners misstate the jurisprudence regarding refusal to carry out an order or policy 15

2) The Court of Appeals did not abuse its discretion to affirm the District Court's decision to decline the exercise of supplemental jurisdiction 21

CONCLUSION 25

APPENDIX

Security Guard Contract 1ra

Invoices 6ra

TABLE OF AUTHORITIES

Page

CASES

Blackie v. State of Maine, 75 F.3d 716, 722 (1st Cir. 1996) 2, 11

Brock v. Casey Truck Sales, Inc., 839 F.2d 872, 876-78 (2d Cir.1988) 2, 11

Carnegie-Mellon Univ., 484 U.S. at 350 n. 7, 108 S.Ct. at 619 n. 7 24

Castillo v. Givens, 704 F. 2d. 181, 188 (5th Cir. 1983) 18, 19

Causey v. Balog, 162 F.3d 795, 803 (4th Cir. 1998) 2, 11

City of Chicago v International College of Surgeons, 522 US 156 (1997) 23

Conner v. Schnuck Mkts., Inc., 121 F.3d 1390, 1394 (10th Cir.1997) 2, 11-13

Cordero v. Turabo Medical Center Partnership, 175 F.Supp. 2d 124, 127 (D.P.R. 2001) 11

EEOC v. HBE Corp., 135 F. 3d. 543 (8th Cir. 1998) ..... *passim*

Faulkner v. United Techs. Corp., 240 Conn. 576 at 784 (Conn. 1997) 20

Foster v. Time Warner Entertainment Company, L.P., 250 F. 3d. 1189(8th Cir. 2001) 1, 17

Gonzalez- De Blasini v Family Department, 377 F3d 81 (1st Cir. 2004) 24

Hooven- Lewis v. Caldera, 249 F. 3D. 259, 278 (4TH Cir. 2001).....2

Kanida v. Gulf Coast Medical Personnel, LP., 363 F.3d 568 (5TH Cir. 2004).....2, 11

Martinez v. Colon, 54 F.3d 980, 990 (1st Cir.1995).....23

McDonnell Douglas v. Green, 411 US 792, 36 L. ED. 2d. 668, 93 S.Ct. 1817 (1973). 2, 13

McKenzie v. Renberg's, Inc., 94 F. 3d. 1478, 1486 (10th Cir. 1996).....*passim*

Moor v. Alameda County, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973).....22

Moyo v. Gomez, 40 F. 3d. 982, 984 (9th Cir. 1994).....2, 11

Pejepscot Indus. Park, Inc. v. Maine Cent. R.R. Co., 215 F.3d 195, 200 (1st Cir.2000).....23

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).....2

Richmond v. ONEOK, Inc., 120 F. 3d. 205 (10th Cir. 1997).....11

Rios v. Rossotti, 252 F.3d 375, 380 (5th Cir.2001).....2, 11

Rodriguez v Doral Mortgage Corporation, 57 F3d 1168, 1177 (1st Circuit 1995).....23

Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 585; 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999).....22

Seaman v. CSPH, Inc., 179 F.3d 297, 301 (5th Cir. 1999).....2, 11

Serrano-Moran v. Grau-Gaztambide, 195 F.3d 68 (1st. Cir. 1999) 24

Tomaiolo v. Mallinoff, 281 F.3d 1(1ST. Cir. 2002) 22

United Mine Workers v. Gibbs, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed. 2d 218 (1966) 22, 23

Vera-Lozano v. International Broad., 50 F.3d 67, 70 (1st Cir.1995) 22

Williamson v. General Dynamics Corp., 208 F.3d 1144 (9th Cir. 2000) 10

Wisconsin Dept. of Corrections v. Schacht, 524 U.S. 381, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998) 22

FEDERAL STATUTES

29 USC § 201 3

29 U.S.C. § 215(a)(3) 10

28 USCS § 1367(c) 23

29 USC §1001 3

RULES

Rules 22 and 30 5

PUERTO RICO STATUTES

Act. No. 80 of May 30, 1976 25

29 P.R. Laws Ann. §185a.....25

INTRODUCTION

The United States Court of Appeals for the First Circuit invoked the elements required by the Fair Labor Standards Act, herein FLSA, to show a retaliation, and relied on what is a statutorily protected activity that triggers the protection of the FLSA anti-retaliation provision to determine that Petitioner Claudio Gotay did not engage in a protected activity while informing his employer about potential FLSA violations of a third party that was not his employer. The criteria relied upon by the Court of Appeals is consistent with the case law of the states and federal courts' decisions. There is no conflict among the Circuits on the application of the FLSA anti retaliation provision criteria required by the Statute.

Petitioners try to create a split within the Circuits where none exists, by pointing to a case with totally dissimilar facts, where an employee refused to comply with an order of her employer that was contrary to the company's manual and could violate her subordinate employee's rights under ADA. *Foster v. Time Warner Entertainment Company, L.P.*, 250 F. 3d. 1189 (8th Cir. 2001). Petition at 15. However, even in that case, the issue for the court was to determine whether under the facts presented Plaintiff stepped out of her duties and incurred in protected activity. For that ruling the Eighth Circuit applied the same criteria of the other circuits.

The Circuits have recognized that in order to establish a prima facie retaliation claim under FLSA, three basic elements must be shown: 1) the plaintiff engaged in a statutorily protected activity; 2) his employer thereafter subjected him to an adverse employment action; and 3) as a reprisal for having

engaged in the protected activity. *Blackie v. State of Maine*, 75 F.3d 716, 722 (1st Cir. 1996); EEOC v. HBE Corporation, 135 F. 3d. 543, 554 (8th Cir. 1998); *Hooven-Lewis v. Caldera*, 249 F. 3D. 259, 278 (4TH Cir. 2001) (retaliation claim under the Rehabilitation Act); *Causey v. Balog*, 162 F.3d 795, 803 (4th Cir. 1998); *Moyo v. Gomez*, 40 F. 3d. 982, 984 (9th Cir. 1994); *Kanida v. Gulf Coast Medical Personnel, LP.*, 363 F.3d 568, (5TH Cir. 2004) (Retaliation claims under the FLSA are also subject to the McDonnell Douglas analytical framework); *Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872, 876-78 (2d Cir.1988) (holding that *McDonnell Douglas* pretext analysis applies to FLSA claims); *Conner v. Schnuck Mkts., Inc.*, 121 F.3d 1390, 1394 (10th Cir.1997) ("In analyzing FLSA retaliation claims, we apply the shifting burden of proof scheme initially articulated in McDonnell Douglas."). *See, e.g., Rios v. Rossotti*, 252 F.3d 375, 380 (5th Cir.2001) ("For retaliation claims, this final burden requires the plaintiff to demonstrate that the adverse employment action would not have occurred 'but for' the protected activity."); *Seaman v. CSPH, Inc.*, 179 F.3d 297, 301 (5th Cir. 1999)

Consistent with the abovementioned the Circuit Courts are applying the same analytical framework affirmed by this Honorable Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) and the burden shifting of *McDonnell Douglas v. Green*, 411 US 792, 36 L. ED. 2d. 668, 93 S. Ct. 1817 (1973).

Here, the Circuit Court of Appeals for the First Circuit applied the same analysis to the facts presented and determined that Petitioner Claudio-Gotay did not meet the elements to show a prima facie of retaliation when in the course of his duties informed his employer

Becton about his belief of a potential FLSA violation by a subcontractor toward that third party's employees. There is no authority to the contrary and no reason for this Honorable Court to alter the established criteria for a claim under the anti retaliation provision of the Fair Labor Standards Act.

Since the federal claim relating to the discharge was dismissed, the Court of Appeals affirmed the District Court's ruling of declining to exercise supplemental jurisdiction over a state claim for unlawfull discharge.

STATEMENT

On January 19, 2001 Plaintiff- Petitioner Efrain Claudio Gotay, and his parents Efrain Claudio Cruz and Elia M. Gotay Maldonado brought suit under the Fair Labor Standards Act, 29 USC § 201 Et. Seq., the Employee Retirement Income Security Act, 29 USC §1001 Et. Seq. (ERISA) and Public Law No. 80 of May 30, 1976, 29 P.R. Laws Ann. §185a, Et. Seq. claiming that Claudio Gotay was unjustified dismissed from his employment at Becton on January 22, 1999. Plaintiffs alleged that his dismissal was in retaliation for his reporting to his employer Becton about a potential violation to the Fair Labor Standards Act allegedly incurred by CM Express, a subcontractor for security services, toward its employees (the guards).

On the other hand, Respondents alleged that Claudio's dismissal was due to his crass insubordination and for not meeting the company's expectations. Claudio did not engage in a protected activity under FLSA, when during the course of his duties overlooking compliance of the security company with the services contracted, informed his employer about a

possible violation of law by the subcontractor. However, Claudio refused to comply with orders regarding approval of invoices for services already rendered by the subcontractor, even though Becton's management met with him, seek a legal opinion from its attorney with Claudio been present and took preventive measure to alert the subcontractor of a possible violation to the FLSA. Nevertheless, Claudio refused to comply with the approval of the invoices creating a substantial debit from his employer Becton to CM Express, exposing Becton to a breach of contract for lack of payments plus the risk of cancellation of the security services in the manufacturing plant.

The District Court entered judgment dismissing the complaint concluding that Claudio did not meet the first element of a retaliation claim under FLSA since he did not engage in a statutorily protected activity while reporting alleged irregularities of an employer that was not his own and in no way responsible for Claudio's job. The District Court also dismissed the COBRA claimed and declined to exercise supplemental jurisdiction over the state law claims since they were substantially derived from the same operative facts of the federal claims previously dismissed.

The Court of Appeals for the First Circuit affirmed in part and reversed in part the Judgment of the District Court. Specifically, the Court of Appeals affirmed the dismissal of the retaliation claim concluding that Petitioner Claudio did not engage in a statutorily protected activity and did not step outside of his duties representing the company while informing his employer about his beliefs of potential irregularities of the subcontractor with respect to its employees. Claudio was concerned with protecting Becton, not asserting rights adverse to it. The Circuit Court

concluded that Claudio attended a meeting with Becton's management to discuss the issue of the guards' overtime[1]; that Becton's attorney[2] concluded that the guards were not Becton's employees, however as a preventive measure they will send a letter to the subcontractor advising about a possible violation of FLSA; Claudio was directed to approve the invoices for the services rendered by the security guards company. Claudio refused to comply with his duties of approving the invoices. Petition App. 5-7.

The First Circuit also affirmed the dismissal without prejudice of the state claims since it had already dismissed the retaliation claim under FLSA. The dismissal of the Cobra Claim was reversed and returned to the District Court since there was a genuine issue of fact in controversy.

On September 29, 2004 Petitioners filed an Application to extend the time to file a Petition for a writ of Certiorari from October 11, 2004 to October 31, 2004. The application was granted until October 31, 2004. However, none of these documents were served on Respondents, even though Rules 22 and 30 of the Rules of the Supreme Court of the United States require so.

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[1] Petitioners claim in the petition that the Circuit Court of Appeals mix up the factual statement, proceeding to analyze incorrect facts in support of the dismissal of he FLSA claims. That is a misstatement.

[2] Petitioners emphasize that Claudio Gotay is a law school graduate, however at the time of the events he was a student and according to his admissions he did not graduate until more than a year after that. However, the legal education that he had was sufficient to make him aware of the consequences of a breach of contract for lack of payment for services rendered.

PETITIONERS' MISSTATEMENTS OF THE FACTS:

Petitioners misstate some of the facts of the case in the Petition, so we will clarify them for this Honorable Court.

Efrain Claudio was employed by Becton Dickinson on September 28, 1998 as Safety Environmental & Process Engineer. After a month in his job, he was assigned the duties of monitoring the security services that were contracted with CM Express Service Corp. (herein CM Express) and approving the security invoices for payment. Claudio's duties included seeing that the guards were at Becton, that they render the services as the contract specified and approving the invoices for payment.

Neither Claudio nor Becton were the supervisors of CM Express' guards as Petitioners claimed. The security services contract between Becton and CM Express, clearly provided that the security guards were employees of CM Express, which was responsible for recruit, train, uniform, them, equip and supervise the guards which were not Becton's employees. (See Clause 4 of Contract, Appendix 1 of Brief in Opposition). CM Express was solely responsible for the hiring, firing and payment of salary, overtime, payroll taxes to the government of Puerto Rico and the United States of America, income tax, Social Security and unemployment pursuant to applicable State and Federal laws of its personnel, including the security guards as well as any other withholding that is the duty of the employer. (Clause 4 of the Services Contract, App. 1 of Brief in Opposition) Becton was only entitled to substitute any of the security guards, at any time without giving CM

Express any explanation but Becton (and consequently, Claudio) lacked authority to hire or fire any of the security guards. Clause 6 of the Services Contract.

The parties agreed that Becton will pay CM Express $6.65 per hour of service, per guard, for a 24 hour daily period plus twelve daily hours in Building Number 30. (Clause 2 of the Contract, App. 1 of Brief of Opposition) CM Express was to invoice the services biweekly and Becton should pay upon receipt. If payment was in arrears for two or more consecutive bi-weekly periods, CM Express might terminate the contract. Clause 9 of the Services Contract. App. 4 of Brief in Opposition.

During his short employment with Becton, Claudio was admonished for tardiness.

Claudio informed his supervisor about his beliefs of potential irregularities committed by the subcontractor regarding overtime payment to the guards. On January 12, 1999[3], a meeting was held with Becton's managerial employees where Claudio exposed his worries regarding the guards' salaries so they agreed to consult with Becton's attorney. After discussing the situation, reviewing the services contract and the benefit of a legal opinion from Becton's attorney, they agreed on sending a letter to CM Express alerting of possible violations to FLSA, as a preventive measure since the guards were not Becton's employees.

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[3] Petitioners alleged that the meeting occurred in January 18, 1999, however, Plaintiff Claudio stated in his deposition that it took place on January 12, 1999, that he was instructed to approve the invoices and that he did not and later wrote a memo (January 18, 1999) with his suggestions, regardless of the legal advise given because he wanted to put his opinion in writing.

From the invoices submitted by CM Express there was no way to determine if, in fact, a FLSA violation was committed as Claudio claimed. The invoices only provided the hours charged to Becton for services rendered at the rate of the contract, not each guard's work shifts, the guard's salary per hour or what had they been paid[4], and the invoices were submitted to Becton biweekly after the rendering of the services[5].

During that meeting of January 12, 1999, with the benefit of a legal opinion, Claudio was instructed in the meantime to approve the invoices for payment, already in arrears, of the services rendered by CM Express. Almost a week later, on January 18, 1999, Claudio returned the invoices with "not approved" accompanied by a confidential memo stating again his opinion already discussed with Becton's management and attorney, expressing that his interest was "to avoid potential liability of Becton Dickinson before any future reclamation related with it." Claudio never complied with his duties of approving the invoices for processing payment owed to CM Express, in spite of the specific instructions, the legal opinion provided by the attorney and the preventive measures taken by Becton's management to alert CM Express of any potential FLSA violation regarding payment of its employees. Consequently, on January 22, 1999 Claudio was terminated from his employment.

The District Court and the Court of Appeals both concluded that Petitioner Claudio did not engage

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[4] It is extremely logical to presume that a profit corporation will received earnings and will not agree in a contract to a similar or lower rate than the one the provider is paying to its employees.

[5] Becton was not paying the guards' payroll, but the services charged biweekly by CM Express after been rendered.

in a protected activity when he informed his employer about his beliefs of a potential violation to the FLSA by a subcontractor, a different employer, regarding payment of wages to said subcontractor employees. They also concluded that Claudio did not step out of his duties, since he was in charge of overseeing that the security services were provided as contracted, neither took any action against his employer that could trigger the protection of FLSA's provisions but on the contrary, had the intention to protect his employer.

The Court of Appeals reversed the dismissal of the claim under COBRA since there was a genuine issue of material fact regarding whether Claudio was given adequate notice within the time period required by COBRA. Petition's Appendix 9.

REASONS FOR DENYING THE PETITION

The decision of the Circuit Court of Appeals for the First Circuit does not conflict with a decision from any Court of Appeals. The Courts have considered the question of whether an employee who complains about a FLSA violation committed by his employer and refuses to participate in an illegal practice and is later dismissed, is entitled to a cause of action under the FLSA anti retaliation provision of said act. For that purpose the Courts have reviewed the facts presented in light of a standard analytical framework to determine if in fact the employee was asserting any rights under FLSA against his or her employer, thus incurring in a statutorily protected activity that would trigger the anti retaliation provision of the statute. If the employee was not asserting any rights against his or her employer, it has been determined that it did not engage in a statutorily protected activity, then is not

entitled to a claim under the FLSA's anti retaliation provision.

1) There is no Circuit split on the Question Presented

a) The First Circuit Court's ruling is not in contravention of the holdings of other Circuit Courts.

The FLSA anti-retaliation provision, 29 U.S.C. §215(a)(3) states:

> "It shall be unlawful for any person to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee."

In Williamson v. General Dynamics Corp., 208 F.3d 1144 (9th Cir. 2000), the Court held that: "The purpose of the anti-retaliation provision is: 1) to provide an incentive for employees to report wage and hour violations by their employers; 2) to prevent fear of economic retaliation by an employer against an employee who chose to voice such a grievance; 3) to ensure that employees are not compelled to risk their jobs in order to assert their wage and hour rights under the Act." In addition, the Court of Appeals for the Ninth Circuit held that: "the FLSA anti-retaliation provision protects not only employees who have filed complaints in court or with an agency but also, employees who have complained to their employers."

The Courts have uniformly held that a prima facie case of retaliation under the FLSA requires a showing that: 1) the plaintiff engaged in a statutorily protected activity; 2) his employer thereafter subjected him to an adverse employment action; and 3) as a reprisal for having engaged in the protected activity. *Blackie v. State of Maine*, 75 F.3d 716, 722 (1st Cir. 1996); Conner v. Shnuck Markets, Inc., 121 F3d. 1390, 1394 (10th. Cir. 1997); EEOC v. HBE Corporation, 135 F. 3d. 543, 554 (8th Cir. 1998); *Causey v. Balog*, 162 F.3d 795, 803 (4th Cir. 1998); *Moyo v. Gomez*, 40 F. 3d. 982, 984 (9th Cir. 1994); *Cordero v. Turabo Medical Center Partnership*, 175 F.Supp. 2d 124, 127 (D.P.R. 2001).

Moreover, the Courts have also ruled that once a prima facie case of retaliation under FLSA is shown, the burden shifting framework of McDonnell Douglas also applies. *Kanida v. Gulf Coast Medical Personnel, LP.*, 363 F.3d 568 (5TH Cir. 2004); *Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872, 876-78 (2d Cir.1988); *Conner v. Schnuck Mkts., Inc.*, 121 F.3d 1390, 1394 (10th Cir.1997); *Rios v. Rossotti*, 252 F.3d 375, 380 (5th Cir.2001); *Seaman v. CSPH, Inc.*, 179 F.3d 297, 301 (5th Cir. 1999); *Richmond v. ONEOK*, Inc., 120 F. 3d. 205 (10th Cir. 1997). So, in order to establish a prima facie case, a plaintiff needs to show that he or she engaged in a protected activity. Engaging in a protected activity requires the assertion by the employee of rights under the statute against his employer, whether in an official or unofficial way.

In *McKenzie v. Renberg's, Inc.*, 94 F. 3d. 1478, 1486 (10th Cir. 1996) the Director of Personnel who was responsible for monitoring compliance with state and federal laws, discuss with the President of the company her concerns about some of their employees not been properly compensated for overtime. Sixteen days later

she was dismissed and proceeded to file suit against her former employer asserting a FLSA retaliatory discharge claim and a state law claim for wrongful discharge. The District Court entered judgment in favor of Plaintiff and later granted a Motion for Judgment as a matter of law under Fed. R. Civ. P. 50. Plaintiff appealed.

The Circuit Court of Appeals for the Tenth Circuit apply the criteria for a retaliation claim and determined that "it is the assertion of statutory rights (i.e. the advocacy of rights) by taking some action adverse to the company –whether via formal complaint, providing testimony in an FLSA proceeding, complaining to superiors about inadequate pay, or otherwise, -- that is the hallmark of protected activity under §215 (a) (3)". The court continued stating that "in order to engage in a protected activity the employee must step outside of his or her role of representing the company and either file (or threaten to file) an action adverse to her employer, actively assist other employee in asserting rights or otherwise engage in activities that reasonably could be perceived as directed towards the assertion of rights protected by the FLSA". Mckenzie, 94 F. 3d. 1478.

The Court held that McKenzie never crossed the line from being an employee performing her job as personal director to an employee lodging a complaint; she never asserted any rights under FLSA or took an action adverse to her employer, but rather acted consistent with her duties, hence she lacked an essential ingredient of a retaliation claim: she did not engage in a protected activity. *McKenzie v. Renberg's, Inc.*, 94 F. 3d. 1478, 1486-1487 (10th Cir. 1996).

Meanwhile in *Conner v. Schnuck Markets, Inc.*, 121 F. 3d. 1390 (10th Cir. 1997), a food clerk filed suit

against his former employer for retaliatory discharge. He alleged been discharged after claiming to his employer that he was owed overtime wages under FLSA when he submitted a complete survey of the unpaid hours. The District Court dismissed the case after concluding that Conner failed to establish a prima facie case of retaliatory discharge. On appeal, the Circuit Court for the Tenth Circuit again relied on the three elements of the prima facie case and the burden shifting framework of *McDonnell Douglas v. Green*, 411 US 792, 36 L. ED. 2d. 668, 93 S. Ct. 1817 (1973). Once applying the same elements, the Court ruled that Conner's actions, contrary to McKenzie's, supra, involved the unofficial assertion of his rights, since he had no management responsibilities regarding the calculation of overtime wages, and therefore, Conner's request for overtime wages was 'adverse to the company' and was a personal complaint about the wage and hour practice of his employer." (Emphasis added). *Conner, supra*, at 1394. The Court of Appeals affirmed the dismissal because after establishing the prima facie case, Conner failed to provide evidence that the legitimate proffered reason of his employer was pretextual.

Contrary to what petitioners claimed, Mr. Claudio's actions are not similar to Conner's. Petitioner Claudio was not responsible for calculating overtime wages of the security guards employed by CM Express but nobody at Becton was either. Indeed, everyone at Becton lacked the correct information[6] and the

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[6] Even petitioner Claudio lacked the information about the wages since he presumed that if a guard worked overtime, Becton was supposed to pay the guards' employer twice the rate of the contract. As we exposed in the facts, the documents submitted to

authority to do so, since Becton was not the guards' employer. Petitioners mislead this Honorable Court when stating that the invoices reveal that the guards were to be paid at regular pay rate, not overtime rate, despite that some hours were worked over the 40 hours per week time frame.

Nevertheless, Claudio was in charge of overseeing that the contracted security services were rendered and had to verify that the total hours invoiced by CM Express were actually offered. If there was a problem with the services he had to report it as part of his duties. So he did, when he believed that the guards' employer, CM Express, could be incurring in a potential violation to FLSA. He proceeded to inform his employer Becton about his concerns in order to protect the company, as he admitted. Petitioner Claudio never claimed to Becton that it owed him or his co employees any money, never took an adverse action against his employer Becton or complained about the wage and hour practice of his company. Even in *McKenzie, supra*, where as part of her role she was alerting the company about the wages and hour practices and possible irregularities of her own employer, the Court found that she did not engage in a statutorily protected activity because she was not asserting any rights.

Thus, it is clear that Petitioner Claudio never asserted his rights under the FLSA and did not engage in statutorily protected activity when alerted his employer about potential irregularities of a different

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the District and the Circuit Court of Appeals clearly reveal that the invoices submitted by CM Express contained the hours charged for daily services rendered by the company CM Express not, by the individual guards. Becton has no knowledge of the guards' work shifts or the salaries paid to them. (App. 5-8 Brief in Opposition)

employer regarding overtime payment of that third party's employees. Therefore, the Circuit Court of Appeals for the First Circuit held consistently with the other Circuit's rulings and the decision is totally supported by the jurisprudence.

b) Petitioners misstate the jurisprudence regarding refusal to carry out an order or policy

Petitioners assert that the present state of law within the First Circuit Courts of Appeals jurisdiction is "that employer (sic) can put their employees in the unfair position of having to choose to participate in a violation of the Fair Labor Standards Act, or any law for the matter, or be dismissed from employment for his refusal to participate in said activity despite the employee's reasonable belief that he would be participating in said illicit activity if he follows orders". Petition, Page 18. That is another misstatement of the facts and the cited case law.

Petitioners also claimed that relying on *EEOC v. HBE Corp.*, 135 F. 3d 543, 554 (8th Cir. 1998) the First Circuit Court concluded "that as Claudio Gotay's duties included the approval of the invoices, as ordered by his superiors, he did not step outside of his duties when he once and again did not approve them". Petition at page 14. However, a thorough review of the Court's opinion does not sustain that conclusion, but demonstrates that Petitioners are mixing up two different arguments. See, Petition's Appendix 4 and 6. Specifically, the Court of Appeals explained the doctrine of stepping out of duties when discussing the first incident of Claudio informing about his concerns. (Appendix Page 4) Then, at App. 6, the court's addressed as a separate incident Claudio's

refusal to sign the invoices and whether that triggered the protection of FLSA.

In *EEOC v. HBE Corp.*, supra, the Court of Appeals for the Eight Circuit dealt with a claim filed by the EEOC on behalf of two employees that were discharged from employment, one for alleged racial discrimination (the manager) and the second one, the director of personnel, in alleged retaliation for standing up for the first one. The Director of Personnel (Ey) objected and refused to follow orders to dismiss the manager (Helms) since he believed that the decision was racially motivated. Prior to the order for dismissal of the manager, the Director of Personnel had been hearing discriminatory racial remarks from his superiors addressed to Helms, so he refused to comply with the order for dismissal. The District Court entered judgment in favor of Plaintiffs.

On Appeal, the Circuit Court for the Eight Circuit analyzed the facts for the retaliatory discharge claim under the same elements required by the other circuits. The Court discussed when an employer can refuse to comply with an order. It was stated that an "opposition must be based on a reasonable belief that an employer has engaged in a discriminatory conduct, Evans, 65 F. 3d. at 100, and it can include refusal to implement a discriminatory conduct". The Court explained that a "requirement of 'stepping outside' a normal role is satisfied by a showing that the employee took some action against a discriminatory policy, (citations omitted), and that the action was based on a reasonable belief that the employer engaged in a discriminatory conduct". *EEOC*, 135 F. 3d. at 554.

The Court distinguished the facts of this case from the ones in McKenzie, supra, since in the latter the personnel director was alerting about potential

violations that kept her within her role, while in EEOC, the director was refusing to implement a discriminatory policy, when his role was to further company policy, hence he was stepping outside the normal managerial role.

Similarly, in *Foster v. Time Warner Entertainment Company, L.P.*, 250 F. 3d. 1189 (8th Cir. 2001), a supervisor filed suit against her former employer claiming that she was discharged in retaliation for opposing discrimination under ADA. Judgment was entered on behalf of plaintiff and the employer appealed. Again, the Court applied the same criteria for a prima facie retaliation claim. The Court reaffirmed the ruling of *EEOC v. HBE, supra*, about opposing an action based on a reasonable belief that the employer engaged in discriminatory conduct and refusing to implement a discriminatory conduct. Here, the manager not only reasonably believed that the action was a discriminatory policy, but it was in clear violation of the provisions in the company's manual.

None of these cases relates to the facts before this Court. Petitioner Claudio, as part of his duties, had to verify the services charged by CM Express and approve the invoices submitted for the services of the company and not of the individual guards, to proceed with payment in compliance with a valid contract.

Even though, Becton was not the guards' employer and had no information to verify if a violation of FLSA was committed indeed by the subcontractor as Petitioner Claudio believed and informed, it took an affirmative action of seeking legal advice and preventive measures of informing the subcontractor about the concerns of a potential violation of the law. Claudio was aware of the legal opinion since he was in the meeting and heard the attorney's recommendation,

so he knew that his employer was not engaged in any violation of the FLSA. However, as part of the contractual obligations between Becton and CM Express, Becton had to comply with payment of services rendered and charged. So, on January 12, 1999, Becton instructed Petitioner Claudio to comply with his duties of verifying and approving the invoices.

Notwithstanding the clear and valid instructions, the benefit of a legal opinion rendered by the company's attorney, his knowledge that Becton was not responsible for paying overtime to the guards and the agreement of preventive measures to inform the subcontractor, Claudio refused to comply with his duties. Instead of complying, almost a week later, on January 18, 1999, Claudio returned the invoices in arrears, unauthorized, and with a memo restating the concerns already discussed in the meeting.

As a law school student at the time, Claudio was aware of the consequences for Becton of a breach of contract for lack of payment of the services rendered and charged by the security company. Accordingly, with his academic preparation along with the results of the meeting held on January 12, 1999, Claudio knew that Becton's instruction of verifying and approving the invoices for payment in compliance with the contract was a legitimate action. Nonetheless, he decided to disregard it without any reasonable explanation, making his employee liable for breach of contract and at risk of been deprived of security services at anytime.

In a futile attempt to justify Claudio's unreasonable refusal to comply with his employer legitimate instruction, Petitioners again misstate two cases. First, they claimed that according to *Castillo v. Givens*, 704 F. 2d. 181, 188 (5th Cir. 1983) Becton was liable for the overtime that could be owed to the guards

because it was not paying enough to the security company for them to pay overtime to the guards. Accordingly, Claudio refused to approve the invoices for payment by Becton to the subcontractor.

Contrary to Petitioners' argument, the facts in *Castillo v. Givens*, 704 F. 2d. 181, 188 (5th Cir. 1983), are not even close related to petitioners. In Castillo, thirty-nine migrant farm laborers filed suit under FLSA for unpaid minimum wages and under the Farm Labor Contractor Registration Act for liquidated damages. Defendant, the owner of a farm, employed a farm labor contractor to furnish him with a crew of field workers to chop cotton, however the "contractor" was not in business by himself, did not meet any of the criteria for an independent contractor and was in fact defendant's employee. Moreover, Defendant provided his "contractor" the exact money for payment of the employees according to the number of workers multiplied by the number of hours worked times $1.65 an hour. The 'contractor' was not capable of paying the minimum wage neither of doing business elsewhere. Thus, the Circuit Court determined that the "contractor" was not an independent contractor but the contact for bringing the employees to the farm, so the field workers were deem employees of the owner.

In the second case cited by petitioners, *Faulkner v. United Techs. Corp.*, 240 Conn. 576 at 784 (Conn. 1997), they claimed that "an employee should not be put to electing whether to risk sanctions (for implementing directives by his employer) or to jeopardize his employment". In that case, plaintiff filed suit against his former employer for wrongful discharge for refusing to participate in a scheme to defraud the United States government, which violated the Major Frauds Act. Plaintiff's job involved the inspection of helicopter parts

provided by suppliers to ensure the parts met the engineering's specifications, including parts to be used in constructing Army's helicopters. Plaintiff rejected defective parts provided by suppliers, then reported the existence of the defective parts to his superiors, who instead warned him that he might be disciplined for rejecting parts he deemed defective. So, some of the alleged defective parts were used in the construction of various helicopters. Later, Plaintiff was dismissed. The Superior Court granted defendant's motion to strike due to defective pleadings. The Supreme Court of Connecticut while reviewing the pleadings, stated that an employee should not be put to an election whether to risk criminal sanction or to jeopardize his continued employment. Faulkner, 240 F. Supp. at 583. Specifically, the court concluded that the Plaintiff held a position requiring him to ensure the quality of the employer's products. If he had followed his superior orders and had approved the use of defective parts, he might have exposed himself to criminal sanctions.

Contrary to this case, Becton's instructions to Claudio were valid, legal and compliance with them, specially after all the discussion and the preventive measures taken, did not expose him to sanctions. On the contrary, disregard of the instructions and failure to approve and proceed with payment of the invoices placing Becton in a breach of contract was an illegal action. Once informed of the legal conclusion that Becton was not incurring in any wrong doing or violation of the law and that preventive measures were taken anyhow, Claudio had no reason to refuse to comply with his duties and exposed his employer to liability for lack of payment for services rendered upon a valid contract.

In view of the above discussed case law, it is clear that the ruling of the Circuit Court of Appeals for the First Circuit affirming the dismissal of Claudio's retaliatory discharge claim for not engaging in a statutorily protected activity under FLSA, is consistent with the rulings and decisions of the other Circuit Courts. The analytical framework relied upon by the First Circuit is uniformly applied in other Circuits, and is adopted from the criteria established by this Honorable Supreme Court for retaliation claims under other statutes, such as Title VII.

2) The Court of Appeals did not abuse its discretion to affirm the District Court's decision to decline the exercise of supplemental jurisdiction

Petitioner invokes supplemental jurisdiction for his claims under Puerto Rico Law 80 of May 30, 1976, 29 L.P.R.A. § 185a *et seq.*("Law 80").

28 USCA § 1367 provides that:

Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over **all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy** under Article III of the United States Constitution. Such

> supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties. (Emphasis added)

Pendent jurisdiction in federal courts is doctrine of discretion, not of plaintiff's right; it justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them . . ..' *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130,1139 (1966); *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585; 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999); (citing *Moor v. County of Alameda*, 411 U.S. 693, 715-716, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973); *Tomaiolo v. Mallinoff*, 281 F.3d 1(1ST. Cir. 2002); *See Vera-Lozano v. International Broad.*, 50 F.3d 67, 70 (1st Cir.1995). A federal court may exercise supplemental jurisdiction over a state claim whenever it is joined with a federal claim and the two claims "derive from a common nucleus of operative fact" and the relationship plaintiff "would ordinarily be expected to try them both in one judicial proceeding." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) *Moor v. Alameda County*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973); *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998)

The decision to whether or not exercise supplemental jurisdiction depends on a host of factors--including (1) circumstances of particular case, (2) nature of state law claims, (3) character of governing state law, and (4) relationship between state and federal claims--Federal District Courts may properly decline to

exercise jurisdiction over supplemental state law claims pursuant to 28 USCS § 1367(c), which provision reflects understanding that federal court, when deciding whether to exercise supplemental jurisdiction, should consider and weigh in each case, and at every stage of litigation, values of judicial economy, convenience, fairness, and comity. See *City of Chicago v International College of Surgeons, 522 US 156 (1997).* The standard for review for supplemental jurisdiction determinations is abuse of discretion, *Pejepscot Indus. Park, Inc. v. Maine Cent. R.R. Co.*, 215 F.3d 195, 200 (1st Cir.2000)

In *Rodriguez v Doral Mortgage Corporation*, 57 F3d 1168, 1177 (1st Circuit 1995), the Court ruled that:

> As a general principle, the unfavorable disposition of a plaintiff's federal claims at the early stages of a suit, well before the commencement of trial, will trigger the dismissal without prejudice of any supplemental state-law claims. *See, e.g., Gibbs*, 383 U.S. at 726, 86 S.Ct. at 1139 ("[I]f the federal claims are dismissed before trial, ... the state claims should be dismissed as well."); *Martinez v. Colon*, 54 F.3d 980, 990 (1st Cir.1995) (affirming the dismissal without prejudice of pendent claims when the district court determined "far in advance of trial that no legitimate federal question existed"). But this praxis is not compelled by a lack of judicial power. It signifies only that, "in the usual case in which all federal law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine--judicial economy, convenience, fairness, and comity--will point toward declining

to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ.*, 484 U.S. at 350 n. 7, 108 S.Ct. at 619 n. 7. Recently confirmed on *Gonzalez- De Blasini v Family Department*, 377 F3d 81 (1st Cir. 2004)

In *Serrano-Moran v. Grau-Gaztambide*, 195 F.3d 68 (1st. Cir. 1999), the District Court declined to exercise supplemental jurisdiction and dismissed the state claims after finding that those claims did not share a common nucleus of operative facts with the original claims, and the facts relevant to the federal civil claim were entirely separate from the facts relevant to the supplemental claim. The Circuit Court of Appeals confirmed that the lower court did not abuse its discretion when declining supplemental jurisdiction since the facts and witnesses as to the two sets of claims were essentially different, not common.

A similar situation occurs with the case at bar: the federal claim remanded to the District Court refers to whether or not Claudio received adequate notice of his COBRA rights within the time frame provided by the statute. Certainly the federal claim under COBRA and the state claim for wrongful termination are two separate and independent claims that will require different evidence and witnesses for each. As a result, the Court of Appeals did not err when affirmed the district court decision for declining supplemental jurisdiction. The record is void of any evidence suggesting that the District Court abused its discretion, so the alleged error was not incurred.

CONCLUSION

The statutes and the case law of this Honorable Court and the Court of Appeals, not only show that there is no split among the Circuit Courts regarding the issues raised by Petitioners, but also demonstrate that the ruling made by the Circuit Court of Appeals for the First Circuit, in the case of Efrain Claudio v. Becton Dickinson Caribe, is consistent with the applicable law. As such, there are no elements present to move this Court to grant Certiorari to review a ruling in accordance with the law and the petition for Writ of Certiorari should be denied.

Respectfully Submitted,

Manuel A. Nuñez Aragunde
(Counsel of Record)

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Attorney for Respondents Victor
Pagan and Hiram Ocasio

December 2004

CERTIFIED TRANSLATION:

SECURITY GUARD CONTRACT

APPEARANCES

FOR THE FIRST PARTY: CM EXPRESS SERVICE CORP., a corporation created pursuant to the laws of Puerto Rico, hereinafter designated as "THE COMPANY".
FOR THE SECOND PARTY: BECTON DICKINSON CARIBE LTD., duly registered and authorized to do business in Puerto Rico, hereinafter designated as "THE CLIENT".

STATE AND AGREE

FIRST: During the life of this contract "THE CLIENT" will use Security Guard Services at the entrance to, as well as at the fenced in premises of Becton Dickinson Caribe LTD, Juncos, Puerto Rico.
SECOND: THE CLIENT agrees to pay the amount of $6.65 per hour, per guard, for a 24 hour daily period; in addition to twelve hours daily in building 30.
The number of daily services may be reduced or increased at the option of "THE CLIENT" with prior written notice to "THE COMPANY." The price agreed to in this contract may be renegotiated by the parties in the event of an increase in the minimum daily wage that affects the salary paid to the Security Guards. The new hourly wage must be acceptable to both parties, in the event that they are not able to reach an agreement, either parties may terminate the instant contract, with a ninety day prior written notice to the other party.

THIRD: The Security personnel to be provided to the client must be duly uniformed.

FOURTH: The Guards shall render the services as required by the Client, but it is agreed that said Guards shall be employees of "THE COMPANY" and not of the client. It will be the obligation of "THE COMPANY" as employer, to recruit the personnel, train them, uniform them, equip them and supervise them. It will also be the obligation of "THE COMPANY" to pay all of the payroll taxes in effect by the Government of Puerto Rico, and the United States of America, income tax, the premium payments for the State Insurance Fund, Social Security, Unemployment, the guards' salaries, the overtime, and any other withholdings that is considered to be the duty of the employer to pay pursuant any State or Federal Law. "THE COMPANY" likewise hereby accepts and understands that neither it, nor any of its employees are "THE CLIENT'S" employees, and that they are therefore not entitled to vacation leave, sick leave, medical plan, Christmas Bonus, nor to any of the other benefits to which "THE CLIENT'S" employees are entitled.

FIFTH: The duties of the Security Guards shall be to provide surveillance and security in the boundary of the fenced in area, the client's premises and plants, control the entry and exit of visitors, always subject to the general orders that are set by "THE CLIENT" for said purposes.

SIXTH: "THE CLIENT" will be entitled to substitute the Security Guards, at any time, without the need to tender any explanation or reason to "THE COMPANY".

SEVENTH: THE COMPANY" will be fully liable for any damages that may be caused by the Security Guards during the performance of their duties. For

these purposes "THE COMPANY" shall maintain public liability insurance policies in the event of bodily injuries, accidental deaths, claims for false arrests, libel, slander, wrongful persecution, etc.

Except for when the loss, damages, liability, Torts or expense is attributable to, or results from negligence on the part of the "THE CLIENT", its agents, and/or employees, "THE COMPANY' shall indemnify, and shall hold harmless "THE CLIENT" for any loss, damages, liability, Torts, or expense claimed or incurred in favor of any person or entity, that may arise or be claimed against "THE CLIENT" , which is attributable to, or stems from the use or occupation of the premise of "THE COMPANY", or from any act, negligence, omission, carelessness or fault incurred by "THE COMPANY", its agents, servants, employees, concessionaires, clients or guests; or due to non compliance on the part of "THE COMPANY" with the applicable laws, ordinances, rules, regulations or statutes. This indemnity must include, but is not limited to Judgments, fines and/or settlement amounts, in addition to Attorney's Fees presently incurred by "THE CLIENT", costs incurred (in Court and out of Court), expert witnesses, Court of Appeals, administration hearings and appeals.

Except for when the loss, liability, Torts or expense is attributable to, or results from negligence on the part of "THE CLIENT", its agents, and/or employees, "THE CLIENT" shall not be liable to "THE COMPANY" for damages, loss, liability, Torts, or expense whatsoever caused to any person, entity or property of "THE COMPANY", or claim by anyone or entity that may stem from the actions, omissions, negligence, faults or carelessness of "THE COMPANY", its agents, servants, employees,

concessionaire, clients or guests or due to "THE COMPANY" shall indemnify and/or maintain "THE CLIENT" indemnified and /or held harmless from any claim or risk as is afore stated in this clause. If "THE CLIENT" is brought into or served with process as a party in any type of litigation or claim initiated against "THE COMPANY", the latter shall protect, defend and hold "THE CLIENT" harmless and shall pay all of the expenses, costs, and Attorney's Fees incurred by "THE CLIENT" related to the proceeding.

EIGHTH: "THE COMPANY" or independent contractor agrees to keep its professional licenses and credentials up to date.

NINTH: The services of "THE COMPANY" shall be invoiced bi-weekly and paid by "THE CLIENT" upon receipt of said invoice. "THE COMPANY" many terminate this contract if the payment of the invoice is in arrears for a period of two or more consecutive bi-weekly periods.

TENTH: The instant contract shall be in effect for a period one (1) year, during said period the parties are bound by all of that is set forth herein.

The contracting parties acknowledge and admit that this contract constitutes the extent of the agreement existing between them and that there does not exist any other agreement, be it verbal or written, with regard to the services that "THE COMPANY" sells to "THE CLIENT."

In Juncos, Puerto Rico on this 1st day of October, 1999.[1]

BECTON DICKINSON CARIBE LTD.
/S/ GREGORIO MATOS COLON
CM EXPRESS SERVICES CORP
GREGORIO MATOS COLON

FOOTNOTE

[1]Translator's Note: 1999 appears crossed out. Written in its stead is "1998" along with two sets of initials. There also appear two sets of initials in the left margin of each page.

CERTIFIED TRANSLATION:

CM Express Service Corp.
Security Patrol Services
13 Narciso Font, Corner of Munoz Riviera, Carolina, P.R. 00985
P.O. Box 7322, Carolina, P.R. 00986 – Tel. 768-4215

BECTON DICKINSON CARIBE, LTD.
INVOICE NO. 3
SECURITY PATROL PARKING
DATE OCT. 31, 1998
JUNCOS, P. R.

DATE	A.M.	P.M.	A.M.	P.M.	TOTAL
F 10-16-98		8: 00	6: 00		10
M 10-19-98		8: 00	6: 00		10
T 10-20-98		8: 00	6: 00		10
W 10-21-98		8: 00	6: 00		10
TH10-22-98		8: 00	6: 00		10
F 10-23-98		8: 00	6: 00		10
M 10-26-98		8: 00	6: 00		10
T 10-27-98		8: 00	6: 00		10
W 10-28-98		8: 00	6: 00		10
TH10-29-98		8: 00	6: 00		10
F 10-30-98		8: 00	6: 00		10
					110 HRS

110 HRS. AT THE RATE OF $6.65----------$731.50

[Translator's note: There appear (3) stamps on the lower part of this page with miscellaneous annotations in English.]

CERTIFIED TRANSLATION:

CM Express Service Corp.
Security Patrol Services
13 Narciso Font, Corner of Munoz Riviera, Carolina, P.R. 00985
P.O. Box 7322, Carolina, P.R. 00986 – Tel. 768-4215

BECTON DICKINSON CARIBE, LTD.
INVOICE NO. 4
SECURITY PATROL PARKING
DATE NOV. 15, 1998
JUNCOS, P. R.

DATE	A.M.	P.M.	A.M.	P.M.	TOTAL
M11-02-98		8: 00	6: 00		10
T 11-03-98		8: 00	6: 00		10
W11-04-98		8: 00	6: 00		10
TH11-05-98		8: 00	6: 00		10
F 11-06-98		8: 00	6: 00		10
M 11-09-98		8: 00	6: 00		10
T 11-10-98		8: 00	6: 00		10
W 11-11-98		8: 00	6: 00		10
TH11-12-98		8: 00	6: 00		10
F 11-13-98		8: 00	6: 00		10
					100 HRS

100 HRS AT THE RATE OF $6.65----------$665.00

[Translator's note: There appear (3) stamps on the lower part of this page with miscellaneous annotations in English.]

CERTIFIED TRANSLATION:

CM Express Service Corp.
Security Patrol Services
13 Narciso Font, Corner of Munoz Riviera, Carolina, P.R. 00985
P.O. Box 7322, Carolina, P.R. 00986 – Tel. 768-4215

BECTON DICKINSON CARIBE, LTD.
INVOICE NO. 7
SECURITY PATROL BUILDING LA 30
DATE NOV. 16 1998
JUNCOS, P. R.

DATE	A.M.	P.M.	A.M.	P.M.	TOTAL
M 11-16-98		6: 00	6: 00		12
T 11-17-98		6: 00	6: 00		12
W 11-18-98		6: 00	6: 00		12
TH11-19-98		6: 00	6: 00		12
F 11-20-98		6: 00	6: 00		12
S 11-21-98	6: 00		6: 00		24
SU11-22-98	6: 00		6: 00		24
M 11-23-98		6: 00	6: 00		12
T 11-24-98		6: 00	6: 00		12
W11-25-98		6: 00	6: 00		12
TH11-26-98		6: 00	6: 00		12
F 11-27-98		6: 00	6: 00		12
S 11-28-98	6: 00		6: 00		24
SU11-29-98	6: 00		6: 00		24
M 11-30-98		6: 00	6: 00		12

240
HRS[1]

240[2] HOURS AT THE RATE OF $6.65---------$1.596.00[3]

[Translator's note: There appear (3) stamps on the lower part of this page with miscellaneous annotations in English.]

[1]Is crossed out, in its stead 228 hrs. appears.
[2]Ibidem.
[3]There appears: "NO. 228 hrs. at the rate of $6.65 = $1,516.20."

CERTIFIED TRANSLATION:

CM Express Service Corp.
Security Patrol Services
13 Narciso Font, Corner of Munoz Riviera, Carolina, P.R. 00985
P.O. Box 7322, Carolina, P.R. 00986 – Tel. 768-4215

BECTON DICKINSON CARIBE, LTD.
INVOICE NO. 8
SECURITY PATROL LA 30
DATE DEC. 15 1998
JUNCOS, P. R.

DATE	A.M.	P.M.	A.M.	P.M.	TOTAL
T 12-01-98		6: 00	6: 00		12
W12-02-98		6: 00	6: 00		12
TH12-03-98		6: 00	6: 00		12
F 12-04-98		6: 00	6: 00		12
S 12-05-98		6: 00	6: 00		12
SU12-06-98	6: 00		6: 00		24
M 12-07-98	6: 00		6: 00		24
T 12-08-98		6: 00	6: 00		12
W 12-09-98		6: 00	6: 00		12
TH12-10-98		6: 00	6: 00		12
F 12-11-98		6: 00	6: 00		12
S 12-12-98		6: 00	6: 00		12
SU12-13-98	6: 00		6: 00		24
M12-14-98	6: 00		6: 00		24
T 12-15-98		6: 00	6: 00		12
					228 HRS.

228 HOURS AT THE RATE OF $6.65---------$1,516.20

[Translator's note: There appear (3) stamps on the lower part of this page with miscellaneous annotations in English.]